BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended;

AND IN THE MATTER OF the complaints of Michael McKinnon alleging discrimination in employment on the basis of race, ancestry, ethnic origin and harassment by Her Majesty the Queen in Right of Ontario, Ministry of Correctional Services, Frank Geswaldo, George Simpson, P. James and Jim Hume.

BETWEEN:

Ontario Human Rights Commission

- and-

Michael McKinnon

Complainant

– and –

Her Majesty the Queen in Right of Ontario, Ministry of Correctional Services, and Frank Geswaldo, George Simpson, P. James and Jim Hume.

Respondents

INTERIM DECISION

Adjudicator: H. Albert Hubbard

Date: October 11, 2001

Board File No.: BI-0115 and BI-0033-95

Decision No.: 01-022-I

Board of Inquiry *(Human Rights Code)*
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APPEARANCES

Ontario Human Rights Commission	)	
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Michael McKinnon, *Complainant*	)	
	)	Kate A. Hughes, Counsel
	)	
Ministry of Correctional Services, Frank Geswaldo, George Simpson, P. James & Jim Hume, *Respondents*	)	
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	)	

FACTUAL BACKGROUND

On March 23, 1999, the hearing into these matters was reconvened to address issues as to the implementation of the orders made pursuant to my decision of April 28, 1998, regarding which I have remained seized pending full compliance therewith. Although issues relating to the financial implications of those orders were resolved at that hearing, it was submitted by counsel both for the Commission and the Respondents that my jurisdiction did not extend to the allegations of post-decision harassment, reprisal and discrimination raised by the Complainant. In my decision of April 20, 1999, dealing with those submissions I concluded that:

> ... I have and should exercise the jurisdiction to hear evidence regarding allegations of continued or repeated discrimination and/or reprisals related to the implementation of the orders made in, and read in the light of, my decision of April 28, 1998, and to make such rulings in that regard as are consistent with that decision and that appear to me appropriate for the purpose of assuring the implementation of those orders and the achievement of full compliance with the *Code*. ... [but that] ... to avoid any overreaching of jurisdiction, before evidence of such allegations is adduced, *I will want the written or oral submissions of counsel as to its relevance to the implementation of the orders herein.* [Emphasis added.]

An application for judicial review of that decision to the Divisional Court was dismissed on March 21, 2001, as being premature in that whether the allegations in question related to the implementation of my 1998 orders could not be determined without my first hearing the evidence in question, it being said (in paragraph 14) that: "The full scope and extent of that retained jurisdiction ... is best left for determination on a complete record, after the Board has made its decision with respect to the relationship between the conduct in question and implementation."

When this hearing resumed on June 20, 2001, counsel for the Complainant stated that damages would not be sought in relation to allegations of post-decision discrimination, harassment and reprisal directed at him, the evidence of which would be led simply to establish the failure of the Ministry of Correctional Services ("the Ministry") to fully and properly implement those aspects of my April 1998 orders intended to cure the "poisoned workplace atmosphere" at the Toronto East Detention Centre ("the Centre"), regarding which expert evidence in support of submissions as to appropriate remedies would also be led. Hence, given

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the clear and close relationship between implementation of the curative aspects of my orders and conduct indicative of a persistently poisoned environment, I decided that it would be unnecessary to entertain submissions as to the relevance of each alleged instance of such conduct (whether directed toward the complainant or others) before deciding that evidence of it may be adduced. Following the disposition of preliminary issues relating to the production of particulars, and it being understood that evidence going to remedy would not be postponed pending a finding of "liability", the hearing was adjourned to August 27.

In her letter to them of August 14, 2001, counsel to the Commission advised the other parties of her intention to call Dr. Ralph Agard to give expert evidence on effecting systemic change in racially poisoned work environments. In that letter she observes that:

> ... Dr. Agard was the consultant who completed the evaluation of the Systemic Change Training Programme by the Ministry of Correctional Services. He was also one of the two consultants who conducted the review on the effectiveness of the Workplace Discrimination and Harassment [Protection] Policy ("WDHP") complaints process. ... It is anticipated that he will give evidence on the Systemic Change Initiative Training Evaluation including the purpose of the evaluation, methodology, findings and recommendations for change made to the Ministry ... [and] ... on the WDHP evaluation including the purpose of the evaluation, methodology, findings and recommendations for change made to the Ministry ... [and] ... on the effectiveness of training as a means of correcting racially poisoned work environments in the corrections setting ... [and it] ... is anticipated that Dr. Agard will be called after the evidence called by [counsel for the Complainant].

While Counsel for the Respondents conceded that Dr. Agard is an expert in the field in question, she objected to his appearance as a witness in these proceedings for reasons relating to "confidentiality" and possible bias. She submitted as well that, if it is decided to hear his evidence, it would be prejudicial to do so before the Respondents' evidence has been given.

AS TO THE MATTER OF CONFIDENTIALITY

On September 7, 2000, the consulting firm Devlin and Associates Canada ("Devlin") entered into an agreement with the Ministry of the Solicitor General and the Ministry of Correctional Services to prepare "a comprehensive review that would result in recommendations for changes and improvements which will address critical issues relating to workplace discrimination and harassment within the Ministries." This was followed on November 22, 2000, by a second agreement in which Devlin undertook to provide the Ministry of Correctional Services with an evaluation of a one-day "Systemic Change Training initiative". Both agreements appear to be in a standard form used for "tender documents for goods and services" and contain the identical stipulation that:

> The Vendor [*i.e.*, Devlin], its directors, officers, employees, agents and contractors shall treat as private and confidential, both during and after this Agreement, any information concerning the business either of the Ministry of the Attorney General or of her Majesty the Queen in Right of Ontario to which it or they become privy in the course of this Agreement.

Dr. Agard was engaged by Devlin to assist in carrying out its first agreement, and this led to a draft report dated August 23, 2001, entitled *A Review of the WDHP Policy Implementation at the Ministry of Correctional Services* (Exhibit 92) of which he is apparently the (or an) author. Although Dr. Agard was not a party to the second agreement either, he was identified therein as "lead consultant". Thus, not only does he possess uncontested expertise with respect to the kinds of matters with which this hearing is concerned, but his first-hand knowledge of the very workplace in question makes his evidence as an expert in the field appear all the more germane, and his testimony regarding events and circumstances observed by him on site is clearly relevant. However, it is submitted on behalf of the Ministry that it has a right (but clearly no duty, one might add) to have such evidence excluded because of the promise of "confidentiality" procured from Devlin which the Ministry maintains extends to all "agents and contractors" such as Dr. Agard. In support of that position reference was made to the decision of the Supreme Court of

Canada in *Slavutych v. Baker et al.* (1976), 55 D.L.R. (3d) 224, (S.C.C.) and to *The Law of Evidence* (Second Edition, Sopinka, Lederman and Bryant).

While the "Vendor" in such contracts may have some obligation to extract a similar promise from persons it engages to carry out its undertaking, as counsel for the Commission pointed out, Dr. Agard is not a party to the contract containing the confidentiality agreement and in the absence of evidence that he had made such a commitment in his contract with Devlin he would not appear to be similarly bound. In any case, in my view, the obligation of confidentiality envisioned by that contract does not extend to the kind of evidence the Commission anticipates eliciting from Dr. Agard.

In *Slavutych*, the appellant professor was asked to provide his written opinion of a colleague whose tenure was under consideration. He was assured strict confidentiality and told that the "tenure sheet" he was asked to complete would be destroyed at the end of the process. His assessment of his colleague as being "highly dishonest, often unethical" was turned against the appellant and used as the basis for his dismissal by an arbitration board. His appeal was allowed by the Supreme Court which held that the arbitration board erred in admitting the tenure sheet as evidence and quashed the decision based thereon while allowing to stand the board's findings in favour of the appellant with respect to other allegations that had been made against him.

Spence J., who delivered the judgment of the Supreme Court, found that on the principles of evidence relating to privileged communications the tenure sheet would be inadmissible in that the following four fundamental conditions for excluding a document advanced by *Wigmore* had been satisfied (the emphasis being provided by him at p. 228 of the D.L.R):

> 1. The communication must originate in a *confidence* that they will not be disclosed.
> 2. This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
> 3. The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*

> 4. The *injury* that would inure to the relation by the disclosure of the communication must be *greater than the benefit* thereby gained for the correct disposal of litigation.

It seems to me inappropriate to refer to Dr. Agard's evaluations, observations, conclusions and recommendations concerning the workplace environment of the Centre as constituting or embodying "confidential communications" made to him by the Ministry, and his views in that regard, even if expressed in whole or in part in a report prepared for Devlin, cannot be characterized as "privileged" information falling within the scope of *Wigmore's* several conditions simply because he had access to that workplace in his capacity as a consultant engaged by the one pursuant to its contracts with the other. Moreover, I fail to see how the relationships between the Ministry and its employees, and amongst the employees themselves, would be "injured" by such disclosures made in the context of an inquiry as to whether its workplace is racially poisoned. Having commissioned consultants to examine and report on the matter, presumably the Ministry would not classify their reports as "injurious" if they happen to contain recommendations for the rehabilitation of a racially poisoned atmosphere in its workplaces; by the same token, explanation and amplification of such a report offered by its author as evidence in this proceeding cannot be seen to be "injurious".

As it happens it was counsel's submission that Dr. Agard's testimony should be excluded not on the basis of privileged communications, but rather on the basis of the "equitable principle of confidentiality" relied upon in *Slavutych* in which, although he disagreed with the latter's finding of bad faith on the appellant's part, Spence J. (at p. 231) "agree[d] exactly" with the following statement made by Sinclair, J.A. in the Court below:

> I believe the equitable principle of breach of confidence has a role to play in the present appeal. It seems to me that when tenure procedure with respect to a candidate is initiated there comes into existence ... something which I will call, for want of a better term, an umbrella of confidence. The protection afforded by this umbrella extends to all within the institution who have a legitimate interest in the tenure proceedings. The nature of that shelter is such that confidential communications, made in good faith, ought not to be used *to the prejudice of their*

> *maker* as a member of the university community. That being so, had the tenure form sheet been submitted by the appellant in good faith, it should not have been used as part of his dismissal proceedings. [The emphasis is mine, and not that of either justice.]

And in *The Law of Evidence* (*supra*, at pp. 718) it is pointed out that in *Slavutych*:

> Spence J. writing for the Court, spoke of protection for confidences as existing apart from the law of evidence. He applied the principles of breach of confidence, which does not have its origin in evidence but in equity. Spence J. relied upon the equitable doctrine which may be invoked to prevent a breach of confidence by prohibiting the disclosure of a confidential statement by one of the parties to the communication, or by prohibiting someone who has obtained a copy of it, from using it *to the detriment of the party who initially made the statement in confidence.* ... the basis of this equitable principle relates to the general duty to act in good faith. It depends on the broad notion of equity that someone who has received information in confidence shall not take unfair advantage of it. ... [Emphasis added.]

Since the Ministry does not object to Dr. Agard appearing as an expert witness as to how best to effect systemic change at the Centre should that workplace be found to be racially poisoned, it would seem that what it seeks to avoid by invoking this "equitable principle" is factual evidence (if any) that he may have of human rights infractions in its workplaces and (or) his expert opinion as to whether the Ministry has succeeded in eradicating the racially poisoned atmosphere that I found to exist in the Centre in April of 1998. However, I fail to see how the "equitable principle of breach of confidence" can have any application to such evidence in the circumstances of this case.

Evidence of misconduct occurring in a workplace cannot be excluded simply because, but for a contract that happens to include a confidentiality clause, the witness would not have been in a position to observe it. For such a person to witness the commission of a crime or racial abuse in its workplace, or to observe racial unrest there, is not to "become privy in the course of [an]

Agreement" to "information concerning the business of the Ministry" which the witness is then bound to "treat as private and confidential". As counsel for the Commission pointed out, the Ministry's employees take an "Oath of Office and Secrecy" whereby they swear that "except as legally authorized or required, [they] will not disclose or give to any person any information or document that comes to [their] knowledge or possession by reason of being a civil servant". Just as that oath cannot be used to prevent employees from testifying and providing documentary evidence of workplace conditions and behaviour in a human rights proceeding so, too, the confidentiality clause inserted by the Ministry in its standard form agreement "for goods and services" cannot be invoked by it to exclude such evidence being given by those who enter such agreements.

Counsel for the Commission indicated that Dr. Agard's expert evidence will simply amplify and explain reports prepared by him for Devlin at the behest of the Ministry, some of which have already been entered as exhibits in this proceeding. No doubt his expert opinion concerning the success or failure of the initiatives he was asked to assess is based in part on information to which he would not have been privy but for the contract between the Ministry and Devlin. However, the extent to which that opinion might be based (if at all) on truly confidential communications made by the Ministry in good faith is unclear and, in any case, it is not proposed that it be used *to the prejudice* or *detriment* of the Ministry whose interest (as witness its contracts with Devlin) must surely lie in eradicating racial strife should it be found to persist in any of its workplaces. Surely it is not the Ministry's position that proof that the atmosphere in the Centre remains poisoned would be a form of injury such that it has an interest in concealing that fact that deserves to be protected by the "equitable principle of confidentiality". Yet that is what the application of that principle to the evidence here in question implies. Under this branch of its argument (as distinct from the question of bias) the Ministry seeks to exclude evidence that it apparently suspects may tend to establish such an atmosphere on the ground that it extracted a broad promise of confidentiality from someone for whom the witness worked as an independent contractor in relation to the matters at issue. I think it inappropriate to characterize either Dr.

Agard or the Human Rights Commission as "someone who has received information in confidence" and who is seeking "to take *unfair* advantage of it" to the prejudice, injury or detriment of the Ministry.

AS TO THE MATTER OF BIAS

On April 2, 2001, Dr. Agard commenced legal proceedings against Devlin and the Ministries of the Solicitor General and of Correctional Services to recover allegedly outstanding fees for work carried out for that consulting firm in relation to its agreements with these Ministries. Counsel for the Respondents submits that this circumstance disqualifies him from giving expert evidence in these proceedings, and that the subsequent withdrawal of his claim against the Ministries does not remove the appearance of bias and lack of independence.

Reference was made in support of the Respondent's position to *Fellowes, McNeil v. Kansa General International Insurance Co.* (1998), 40 O.R. (3rd) 456, in which the defendant insurance company counterclaimed for damages for solicitor's negligence. Having terminated its retainer with the plaintiff law firm regarding a particular insurance claim, the defendant engaged another solicitor (Mr. McInnis) both to assume carriage thereof and to investigate the possibility of a negligence claim against the plaintiff. Objection was taken at the trial when the defendant sought to call Mr. McInnis to give expert evidence regarding the standard of care of a reasonably competent solicitor. In deciding that he was not qualified to do so the Court observed that:

> An expert must have a minimum requirement of independence. ... By reason of the roles assumed by him, I find that Mr. McInnis cannot be such an expert. He has been an advocate for Kansa's positions since he became involved in the matter ... Experts must not be permitted to become advocates. To do so would change or tamper with the essence of the role of the expert, which was developed to assist the court in matters which require a special knowledge or expertise beyond the knowledge of the court... If I look to only two of the seven duties and responsibilities of experts testifying in civil cases that are laid out in *The "Ikerian Reefer"*, [1993] Lloyd's Rep. 68, at 81, I have to conclude that this would not be a case for Mr. McInnis to assume the role of an Expert. These duties are:

> (1) Expert evidence presented to the Court should be, and should be seen to be, the independent product of the experts uninfluenced as to the form or content by the exigencies of litigation
> (2) An expert should provide independent assistance to the court by objective, unbiased opinion in relation to matters within his or her expertise. An expert witness should never assume the role of an advocate.

In my view, Dr. Agard's independence as an expert witness in these proceedings has not been compromised, in fact or in appearance, by his having commenced legal proceedings against Devlin and the Ministry for payment of allegedly outstanding fees. The former is not a party to these proceedings and, not only has his action against the latter been withdrawn, but that dispute has nothing to do with the substance of the opinions, evaluations and recommendations for which he is seeking payment. Moreover, unlike the disqualified expert in *Fellowes* who had previously been engaged by the defendant to assume an adversarial role against the plaintiff regarding the very matter on which his expertise was sought, Dr Agard has never been employed in an adversarial role by any of the parties to this proceeding with a view to building a case against the Ministry with respect to the matters on which the Commission is seeking his expert opinion. He is no more an "advocate" for any party's "position" in this proceeding than is any other witness who may be called upon to give evidence. The written evaluations of the Ministry's programmes and policies that Dr. Agard provided to Devlin before commencing proceedings to get paid for them are clearly an "independent product uninfluenced as to form or content by the exigencies of litigation", as would be any elaboration and explanation thereof that might be of assistance to this Board. It is difficult to see how such evidence (which he alone can give) might be less than objective and unbiased simply because of a dispute with Devlin over payment for his contribution to reports that the Ministry might seek to rely on for such purposes as establishing compliance with my orders of April 1998.

What served to disqualify the would-be expert in the *Fellowes* case was that he had on behalf of the defendant been "investigating, from the outset of his retainer, the matter of a

potential claim based on negligence against" the plaintiff, and his view as to the standard of care by which the defendant's conduct was to be measured risked being "advocacy dressed up as opinion". In contrast, Dr. Agard was not retained by the Commission to investigate the Ministry's workplace with a view to establishing against it responsibility for human rights infringements, and the evidence he will be asked to provide is in respect of an evaluation of the effectiveness of policies and initiatives of the Ministry that Devlin engaged him to formulate. There is no risk that his explanation and amplification of reports written by him prior to suing to recover payment for that work will actually or apparently amount to "advocacy dressed up as opinion".

DECISION

While it remains open to the Respondents, of course, to explore questions of possible bias and lack of objectivity on cross-examination, for the above reasons the motion to disqualify Dr. Agard as an expert witness in these proceedings either because of his having been engaged by Devlin in relation to its contracts with the Ministry, or because of his having commenced the litigation in question, is hereby dismissed. However, I agree with the Respondents' submission that it might be prejudicial to hear expert evidence as to what ought to be done to abate a racially prejudiced atmosphere at the Centre without having first heard the Ministry's evidence as to whether that workplace is so affected. Since it would be impractical to separate Dr. Agard's evidence as to factual matters from his expert opinion, fairness dictates that his evidence be heard after that of the Respondents, but before any rebuttal evidence.

Dated at Toronto this 11th day of October, 2001.

H. A. Hubbard,
Chairperson